

Improving the summary jury trial

Although the summary jury trial has been used for more than a decade, it remains controversial.

To improve its value as a "niche" ADR device, litigants should take advantage of its flexibility, focusing especially on its potential as a binding process.

by Thomas B. Metzloff

Interest in alternative dispute resolution has never been greater. No longer a novelty, ADR is routinely used in a wide variety of litigation contexts. The last 10 years have seen a proliferation of ADR techniques, each potentially promising important contributions to the fair and efficient resolution of disputes.

This proliferation creates possible problems, however, as judicial policy makers and attorneys sort among the different choices seeking informed ADR strategies. The difficult task of assessing whether to use a particular process is perhaps best illustrated by the summary jury trial (SJT), a rather controversial ADR technique.

In a prototypical summary jury trial, the opposing attorneys briefly present their cases before a jury, which renders a non-binding verdict. To minimize the parties' expense and the court's time, the SJT is greatly abbreviated compared with a traditional trial—a typical one can be completed in a day or less. This economy is achieved by using various procedural

shortcuts, such as restricting questioning during jury selection, limiting evidentiary objections, omitting marginal evidence, and curtailing jury instructions. The most crucial element is the use of attorney summaries of evidence in lieu of live testimony. In this way, the SJT imitates but hardly replicates a traditional jury trial.

In fact, however, actual SJT formats have varied widely from the prototype described above. Important differences have been observed with respect to trial length, judges' case selection strategies, rules controlling admissibility of evidence, and approaches for conducting post-SJT settlement discussion.¹ To some, these variations reveal the technique's flexibility. For others, it indicates a lack of definition.

Invented and first used in 1980 by U.S. District Judge Thomas Lambros of the Northern District of Ohio, the summary jury trial quickly achieved prominence within the growing ADR movement. Actively supported by judges interested in controlling burgeoning dockets,² the SJT became commonplace in a few federal district courts. Its appeal probably was due to the fact that it was one of the few ADR methods designed for complex cases. Its use of lay jurors was no doubt attractive to traditional litigators as well.

Advocates have billed the SJT as ac-

curate, useful for a wide variety of case types, easy to implement because it requires little additional administrative support, and cost effective for the parties and the court. Indeed, its proponents have gone so far as to label it a no-risk procedure because, even if the parties do not settle, the efforts invested in the process would supposedly streamline the subsequent full trial.

Differing justifications

How exactly do summary jury trials promote settlement? The technique's settlement-enhancing powers have been explained under at least four different theories:

- *Jury preview effect.* The most often-cited justification for the SJT is that the attorneys will afford the surrogate verdict substantial weight in considering settlement. SJT proponents surmise that the key obstacle to settlement is the uncertainty associated with predicting how a jury might decide the case. The summary jury trial overcomes this valuation gap by providing an important clue as to how a typical jury would decide.

- *Party enlightenment/cathartic impact.* The clients are required to attend the SJT in the hope that viewing a balanced presentation of the evidence will encourage settlement. By hearing both sides without the filtering of informa-

1. See PROVINCE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 68-76 (1986) (discussing the flexibility of SJT formats).

2. See *Lockhart v. Patel*, 115 F.R.D. 44, 47 (E.D. Ky. 1987) ("[T]he exigencies of modern dockets demand the adoption of novel and imaginative means [such as the SJT] lest the courts, inundated by a tidal wave of cases, fail in their duty to provide a just and speedy disposition of every case.").

tion by their attorneys, clients may, for the first time, be forced to acknowledge the opposing position's strength. A related assertion is that the SJT will have a cathartic effect on the litigants. By being provided their "day in court" (or at least their "half-day in court"), litigants are more likely to settle.

• *Scheduling impact.* Another view is that merely scheduling a case for a summary jury trial may result in settlement. Because some attorneys do little preparation, establishing a firm date for trial—even a non-binding one—forces attorneys to review the case, which may change their appraisal of the likely outcome.³

• *Fear/exhaustion factor.* A projected impact that is not as loudly proclaimed as the others is that summary jury trials foster settlement by exposing litigants to the vagaries and expense of the jury system, which tends to discourage interest in further litigation. Thus, even if a summary jury result is irrational, it may highlight the inherent risk associated with juries.⁴

These justifications do not provide a consistent concept of the SJT's attributes. For example, the importance of the *quality* of the summary jury's decision varies considerably among the theories. Under the preview effect, the quality of the summary verdict is essential; it assumes that the verdict will accurately predict the result of a "real" jury. In contrast, the party enlightenment effect is based less on quality of result than on litigant participation. Under the fear/exhaustion factor, the quality of the verdict is largely incidental. Indeed, the more outlandish the result, the more likely it would be to convince at least one of the litigants to settle at almost any cost.

A second observation is that several of the justifications evidence an anti-attorney bent that is surprisingly at odds with the summary jury trial's format, which depends heavily on attorney involvement to present evidence. For example, the party enlightenment and fear/exhaustion rationales are justified in part because attorneys may fail to give their clients reasonable advice or otherwise fail to communicate with them effectively. Similarly, the preview effect is partly based on the assumption that attorneys—particularly

plaintiffs' attorneys—may have evaluated the case unrealistically.

Nor do proponents make clear why the summary jury trial is the preferred ADR approach for overcoming some of the identified settlement barriers. Compared with other options, the SJT occurs late in the litigation game. The process itself is relatively elaborate and expensive. In contrast, other ADR methods may be better suited to overcoming settlement obstacles. For example, if a cathartic process is needed, mediation would seem preferable because it permits litigants a direct opportunity to vent frustrations and to explain important concerns not technically relevant to the legal issues raised.

Criticisms

Given this background, what overall impacts has the SJT had? Until now, it has been used primarily by a small cadre of sympathetic federal judges who have actively recommended or mandated its use. The initial glowing reports of the technique's success spurred some state courts to consider using it. To date, however, translating the summary jury trial's benefits from federal to state courts has proven difficult.⁵

Numerous critics have emerged. The first salvo was fired by Seventh Circuit Judge Richard Posner, who, in an influential article, questioned both the SJT's utility and its ethical propriety.⁶ Posner's primary point was to

challenge SJT proponents to demonstrate empirically that the process has in fact helped reduce court backlogs in those districts where it had been widely used.

Since Posner's article, the SJT has been subjected to a series of increasingly virulent attacks that have exposed a number of supposed weaknesses.⁷ Critics have asserted that the summary jury's verdict is not based on the merits of the case, but rather the jury's assessment of the credibility of the lawyers.⁸ Some have questioned whether it is appropriate to permit unprepared attorneys to participate in a summary jury trial where they might benefit from seeing their opponent's presentation prior to the subsequent "real" trial. In addition, even conceding that the process may prove effective in particular disputes, it has been suggested that other ADR methods—particularly court-ordered arbitration or mediation—would achieve comparable results with less cost to litigants and the courts.

These criticisms have been reflected in a series of recent legal challenges to the summary jury trial. The Seventh Circuit has held that federal judges do not have the authority to mandate the use of SJTs.⁹ This was a damning blow to the classic SJT, which depends largely on active judicial involvement in identifying appropriate cases and requiring participation to overcome

3. Cf. *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448, 449 (M.D. Fla. 1988) (noting that many attorneys are ill-prepared for trial, and that "[t]he reality is that too many will not get ready until the day of a trial; a summary trial forces that day and that preparation").

4. The need to concoct such a theory was largely caused by the widely reported result in *Stites v. Sundstrand Heat Transfer, Inc.*, 660 F. Supp. 1516 (W.D. Mich. 1987), a major product liability case subjected to an SJT format employing two different jury panels. One summary jury found for the plaintiff in the amount of \$2.8 million; the second found for the defendant. The case subsequently settled, and the judge deemed the process a success because it "demonstrated to both sides that they might win the case at a full trial on the merits, yet also risk defeat as shown by the inconsistency of the verdict in the summary jury trial." Enslen, *Summary Jury Trials Can Help Settlement in Toxic Tort Cases*, 2 ALTERNATIVE DISP. RESOL. REP. 46 (1988). An alternative explanation is less complimentary and focuses on the obvious inconsistency in results which raises concerns with the quality of the SJT process.

5. The experience in North Carolina provides a good example. North Carolina was one of the first states to establish an SJT program. Despite considerable marketing efforts, only 17 SJTs—far less than had been hoped for—were conducted during the pilot project phase of the program. For a

detailed description of the North Carolina experience, see Metzloff, et al., *SUMMARY JURIES IN THE NORTH CAROLINA STATE COURT SYSTEM* (Private Adjudication Center, 1991). Interestingly, however, those cases that were conducted used a variety of creative SJT formats, including a binding format for use in major disputes. Subsequently, the program was restructured to permit the state-wide use of SJTs with emphasis on party-designed procedures expressly focusing on its use as a binding process. See N.C. General Rule of Practice 23.

6. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986).

7. The various criticisms of the SJT are well summarized in Wiegand, *A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials*, 69 OR. L. REV. 87 (1990).

8. See Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 40 (1987) (arguing that allowing SJTs in cases presenting substantial issues of veracity such as intent or conspiracy "institutionalizes inaccuracy and harms dispute resolution quality").

9. See *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988). For useful discussions of the asserted bases for judicial power to mandate the SJT, see Webber, Note, *Mandatory Summary Jury Trial: Playing by the Rules?*, 56 U. CHI. L. REV. 1495 (1989).

litigant reticence. Commentators are sharply divided on the advisability of mandatory referrals, although it is likely that this issue has been mooted by recent congressional authorization to use SJTs as part of comprehensive case management plans.¹⁰

The conflicting accounts of the merits of the summary jury trial make it difficult to assess. Unfortunately, few empirical projects have focused on the SJT,¹¹ thus leaving serious gaps in understanding how the process works. Indeed, the shortage of systematic evaluations has itself become a rallying cry of SJT critics. In response, supporters properly note that the summary jury trial was never intended to be used indiscriminately, so that random assignment of cases would fail to provide a fair test. But even accepting that conducting a full-blown study of SJTs with random assignment is not feasible, numerous issues could be addressed by neutral researchers.¹²

Voluntary, binding SJT

What is the appropriate role of the summary jury trial in developing a comprehensive ADR strategy? SJT proponents are likely to assert that recent experiences showing low voluntary use confirms the need for judicial power to mandate its use. But the many warnings in terms of the SJT's unproven effectiveness argue against its wholesale adoption in favor of its flexible use as a "niche" ADR device.

Judicial policy makers should focus more on the use of *binding* summary jury procedures.¹³ To date, virtually no discussions have given any serious consideration to the SJT's potential as a binding procedure. The possibility

that litigants might occasionally agree to make the result binding has been noted, if at all, only as an afterthought. How often parties in fact opt to make the result binding or, more importantly, when they should consider the binding option, has not been detailed. Because SJTs are expected to be used in intractable cases, it has perhaps been assumed that the litigants, who by definition are unable to agree on settlement, would be even less likely to agree on a binding ADR process, especially one that entails such a peculiar imitation of the traditional trial process. SJT proponents may simply have concluded that in its present form, the technique is not sufficiently trustworthy to be binding.

A restructured summary jury trial could perform this new role by offering litigants the opportunity to reduce both the expense of litigation and the risks inherent in the existing jury system. For example, parties to a binding SJT frequently agree to a "high/low" settlement arrangement or a cap on the total damages the plaintiff will receive as a means of avoiding the risk of a runaway jury. Alternatively, the parties could give the SJT judge the authority to review the merits of the damage award. In a sense, this empowers the judge to act like an appellate court, but without the delay and additional expense of a formal appeal.

The theory of the binding SJT rejects the common assumption that the process is intended for cases in which conventional negotiations have failed. Instead, it seeks a broader role by providing an ADR option for litigants presently forced to settle, but who would prefer a binding adjudication if

the process could be made less expensive and more predictable. The process allows litigants to obtain a binding adjudication of their dispute at a reasonable cost without the risks inherent in the current jury system.

In this new formulation, the SJT is not a means of "shunting off" cases headed to trial, but rather a procedure of choice for cost-conscious or risk-averse litigants. Developing this option is also consistent with the growing evidence that litigants may prefer some form of adjudication as opposed to settlement.

A binding SJT approach offers the potential for significant cost savings to the litigants. Unlike a court's decision to mandate a traditional SJT on the eve of trial, the parties' decision to employ a binding SJT could be made early in the litigation process (perhaps even before suit is filed). After limited discovery, the case could be tried in an abbreviated fashion in which various procedural shortcuts—many borrowed from the typical SJT format, such as the use of summarized evidence—could be employed. The litigants' goals in formatting the process would be more broadly defined than in the classic SJT context, where the court-initiated process is largely driven by an interest in shortening trial lengths. For example, because the parties have committed the resolution of their dispute to the process, they may often be interested in providing more information to the summary jury than would be the case with the traditional SJT. Serving this interest would usually entail the limited use of live or videotaped testimony on critical issues.

It is unjustified to assume that all of the procedural niceties associated with a traditional jury trial are essential to a fair procedure; whether various evidentiary principles and trial techniques in fact ensure a "fair" trial is questionable. Litigants could rationally decide to forego many of these procedural amenities and accept a less-than-textbook-perfect trial if overall litigation costs could be reduced and if the risk of aberrational jury decisions were controlled. Accordingly, the parties may choose to resurrect other trial conventions relating to such procedural variables as jury selec-

10. CIVIL JUSTICE REFORM ACT OF 1990, 28 U.S.C.A. §473(a)(6)(B) (West Supp. 1991).

11. Apart from a few studies that show that relatively few SJTs do in fact go to trial, see Alfani, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 OHIO ST. J. ON DISP. RESOL. 213 (1989) (finding that only 9 percent of cases in a voluntary state court SJT program and 14 percent of cases in a mandatory federal court program proceeded to trial), and others dealing with litigant satisfaction, there are virtually no objective SJT studies.

12. For example, detailed descriptions of settlement dynamics in "successful" SJT cases would be useful. SJT proponents deem any settlement reached prior to a conventional trial as a "success." It is illogical to assume a causal relationship between an SJT and a settlement simply because the dispute settles. An SJT verdict may play only a minor role in comparison to other factors. In addition, detailed case studies could focus on the

quality of summary juries' deliberative process to provide litigants with greater assurances that juries have sufficient information to make reasonable decisions. See Archer Rowland, *Comment, Communication and Psychology Variables: Reasons to Reject the Summary Jury Trial as an Alternate Dispute Resolution Technique*, 39 KAN. L. REV. 1071, 1088-101 (1991). Research should also be directed as to whether the process is biased in favor of plaintiffs. The SJT's compressed format may tend to emphasize the importance of the jury's initial impressions of the evidence, thus giving the plaintiff a possible advantage.

13. For a more extended discussion of binding summary jury procedures, see Metzloff, *Reconfiguring the Summary Jury Trial*, 41 DUKE L. J. 806 (1992). A recent comment by an Arizona state court judge has noted the benefits of binding SJTs. See Schneider, *Summary Jury Trials with Ceilings and Floors*, LITIGATION, Summer 1991, at 3.

tion, cross-examination, evidentiary rules, and jury instructions. Even if some traditional trial accoutrements are reinstated, the possibility for significant reductions in trial length remain. This new approach anticipates that the litigants will agree to center the trial on the key issues by either excluding jury consideration of collateral matters or establishing firm limits on trial length to force presentations to be focused.

Because the format is not imposed by the court (as is the case with most traditional SJTs), the parties will incur higher transaction costs in terms of establishing ground rules. Over time, however, it is expected that a number of established formats will be developed either by private ADR providers or by the courts themselves. Variables that the parties could consider include: (1) limiting time for argument and presentation of evidence; (2) agreeing upon reductions in the number of witnesses; (3) using affidavits, factual summaries, or videotaped evidence; (4) permitting the jurors to take notes or ask questions; (5) abbreviating jury selection procedures; (6) shortening jury instructions; and (7) agreeing upon a procedure for resolving the

case in the event of a hung jury.¹⁴ This approach places a premium value on encouraging creativity by the litigants in terms of SJT design—an important departure from the approach followed by most other courts that have detailed a paradigm SJT model.

As a voluntary process, binding SJTs may well be used infrequently, thus relegating the SJT to a subordinate role in the judiciary's evolving ADR strategy. Other ADR approaches—such as the continued expansion of court-ordered arbitration or the use of mediated settlement conferences—are better suited to the institutional goal of reducing caseload pressures.

A schizophrenic device

In considering the summary jury trial, one is confronted with sharply conflicting accounts of its performance and promise. In some respects, the classic SJT is schizophrenic. While it accepts the existing dynamics for pre-trial discovery and settlement despite evidence that those processes may be inefficient, expensive, and potentially unfair, the SJT rejects virtually all existing safeguards with respect to the trial process and replaces them with an emaciated version. This sharp division

in approach provides fertile grounds for criticism.

The most intense criticisms of the summary jury trial, however, are unwarranted. Too much attention has been given to debating the merits of an admittedly experimental process, and too little to reexamining and refining its evolving role. The key issue may not be so much in determining whether the SJT has been proven "effective" as it is in continuing to debate its role in facilitating the fair resolution of disputes. Our historical commitment to the jury "invites us to improve the litigation system by refining and enlarging the use of the civil jury, not by eliminating it."¹⁵ The summary jury trial, in any of its forms, responds to that commitment. We must continue to ask the hard questions about how it works, and, more importantly, how we can make it work better. Permitting and promoting its use as a binding process represents a particularly inviting avenue. □

14. See Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119.

15. Galanter, *The Civil Jury as Regulator of the Litigation Process*, 1990 U. CHI. LEGAL F. 201, 257.

THOMAS B. METZLOFF is a professor of law at Duke University School of Law.

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grams. We need more of them in the future."⁹ Burger's comments have been bolstered by Chief Justice William Rehnquist, who in referring to summary jury trials and other methods of alternative dispute resolution, said that "in some areas of the law they will become not the alternative method of resolving disputes, but the usual and customary method."¹⁰ The process of summary jury trials is a pioneering attempt that has proved successful and may very well be the catalyst for the development of new alternative dispute resolution methods. It is a way for judges to assist in settlement negotiations that, ultimately, enables judges to control and manage the ever-increasing number of

cases filed in the courts.

Summary jury trials provide litigants and lawyers with a critical sense of the dispute—a sense of proportionality, reality, and objectivity. While the process makes one come to grips with the case, it is not binding. Parties, therefore, settle or get a second bite at the apple if they choose. The summary jury trial is thus an efficient and effective alternative in our effort to do justice.

Our judicial system must continue to evolve in order to meet the demands of the future. We must develop alternative means for resolving disputes while not infringing on constitutional rights or jeopardizing the fundamental aspects of our adversarial system. Judges and lawyers must focus

on improving the process and encouraging voluntary resolution of disputes.

We have begun a new era in our adversarial process with the evolution of new models of advocacy. The summary jury trial is an integral part of this evolution, earning its status as a vital part of the American adversarial system. □

9. ALTERNATIVE METHODS FOR PROMOTING SETTLEMENTS, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT COURT JUDGES 43, 68, 69 n. 171 (Federal Judicial Center, 1986), quoting Burger, 1984 YEAR-END REPORT ON THE JUDICIARY.

10. Rehnquist, *THE OLD ORDER CHANGETH*, Remarks to the Australian Bar Association, Sydney, Australia 24-25 (September 2, 1988) (transcript available from Chief Judge Lambros).

THOMAS D. LAMBROS is chief judge of the U.S. District Court for the Northern District of Ohio and inventor of the summary jury trial.